A

BOO ARE NGOR

v.

CHUA MEE LIANG

B

FEDERAL COURT, PUTRAJAYA
ALAUDDIN MOHD SHERIFF PCA
HASHIM YUSOFF FCJ
ZULKEFLI MAKINUDIN FCJ
[CIVIL APPEAL NO: 02(i)-24-2008(J)]

C

7 OCTOBER 2009

CIVIL PROCEDURE: *Action - Striking out - Abuse of process - Defendant participated in suit which is an abuse of process - Whether defendant estopped from subsequently having it struck out - Inherent*

D *powers of court*

CIVIL PROCEDURE: *Striking out - Action - Abuse of process - Defendant participated in suit which is an abuse of process - Whether defendant estopped from subsequently having it struck out - Inherent*

E *powers of court*

EQUITY: *Estoppel - Estoppel by election - Proper application of principle*

This was an appeal by the appellant/defendant against the decision of the Court of Appeal dismissing the defendant's appeal against

F the dismissal by the High Court of the defendant's application to strike out the respondent's/plaintiff's second suit – filed by the plaintiff after the High Court had struck out her first suit – on the ground that it amounted to an abuse of the process of the court. The Court of Appeal dismissed the defendant's appeal on the

G ground of estoppel by election in that by virtue of her participation in the second suit, the defendant was thereby estopped from applying to strike out the second suit. The Court of Appeal cited the case of *Meng Leong Development Pte Ltd v. Jip Hong Trading Co Pte Ltd* as the authority for such a proposition.

H The defendant was granted leave to appeal against the Court of Appeal's decision on the following question: Where a defendant to a suit which is an abuse of process has taken part in the suit, is he estopped, by virtue of such participation, from subsequently having it struck out?

I

Held (allowing the appeal with costs)
Per Zulkefli Makinudin FCJ delivering the judgment of the court:

(1) There was no basis upon which an equity could arise in favour of the plaintiff having noted that the plaintiff in fact elected to end her litigation by not appealing against the High Court order striking out of her first suit. The plaintiff was estopped from filing the second suit. With respect, the Court of Appeal had misapplied the ratio of estoppel by election under the principle enunciated in *Meng Leong*'s case. The respondent in *Meng Leong*'s case was faced with an alternative course of direction in the enforcement of judgment where the respondent, having elected its course of direction to enforce judgment for damages, was estopped from filing an appeal for specific performance. The abuse of the court's process was not in issue in *Meng Leong*'s case. In the present case, abuse of the court's process was very much a contentious issue, and had nothing to do whatsoever with an enforcement of judgment as far as election of a mutually exclusive course of direction was concerned. Hence, Meng Leong's case was readily distinguishable and could not be applied in the present case. *Meng Leong Development Pte Ltd v. Jip Hong Trading Co Pte Ltd* (dist). (para 5)

(2) The filing of appearance, statement of defence and amended statement of defence by the defendant did not constitute taking a fresh step in the proceedings that debarred her from challenging the validity of the second suit. What the defendant had done in this case was to take precautionary measures to prevent judgment in default being entered against her. The plaintiff, after four years, still did not show any serious intention to set the case down for trial. This pattern of delay was no different from the first suit where the plaintiff, after having obtained directions on the conduct of the suit, had failed to comply with them, leading to the first suit being struck out. On the background facts of this case, the defendant had rightly applied to the court to invoke its inherent powers to strike out the plaintiff's second suit as an abuse of the process of the court. The defendant could not be said to have waived her right to apply to strike out the second suit on the ground that she had participated in it.

A Under such circumstances, the court is not prevented from exercising its inherent jurisdiction to strike out cases found to have abused the process of the court. *Gabriel Peter & Partners (suing as a firm) v. Wee Chong Jin & Ors* (foll). (paras 6, 7, 8, & 9)

B **(3)** For the reasons stated above, the question posed in this appeal would be answered in the negative. (para 10)

Bahasa Malaysia *Translation Of Headnotes*

C Ini adalah rayuan oleh perayu/defendan terhadap keputusan Mahkamah Rayuan menolak rayuan defendan terhadap penolakan oleh Mahkamah Tinggi permohonan defendan untuk membatalkan guaman kedua responden/plaintif – yang telah difail oleh plaintif selepas Mahkamah Tinggi telah membatalkan guaman pertamanya
D – atas alasan bahawa ia merupakan sesuatu penyalahgunaan proses mahkamah. Mahkamah Rayuan menolak rayuan defendan atas alasan estoppel melalui pemilihan di mana disebabkan penglibatannya dalam guaman kedua, defendan dengan itu telah diestop dari memohon untuk membatalkan guaman kedua.
E Mahkamah Rayuan menamakan kes *Meng Leong Development Pte Ltd v. Jip Hong Trading Co Pte Ltd* sebagai autoriti untuk proposisi sebegitu. Defendan telah diberi kebenaran untuk merayu terhadap keputusan Mahkamah Rayuan atas soalan yang berikut: Di mana seorang defendan kepada sesuatu guaman yang merupakan suatu
F penyalahgunaan proses telah terlibat dalam guaman itu, adakah beliau diestop, disebabkan penglibatannya, dari kemudiannya berjaya mendapatkannya dibatalkan?

Diputuskan (membenarkan rayuan dengan kos)

G **Oleh Zulkefli Makinudin HMP menyampaikan penghakiman mahkamah:**

(1) Tidak ada apa-apa dasar atas mana suatu ekuiti boleh berbangkit dalam pihak plaintif memandangkan bahawa plaintif
H sebenarnya telah memilih untuk menamatkan litigasinya dengan tidak merayu terhadap perintah Mahkamah Tinggi yang membatalkan guaman pertamanya. Plaintif telah diestop dari memfail guaman kedua. Dengan hormatnya, Mahkamah Rayuan telah tersalah pakai ratio estoppel melalui pemilihan di bawah
I prinsip yang dinyatakan dalam kes *Meng Leong*. Responden dalam kes *Meng Leong* menghadapi sesuatu haluan alternatif dalam penguatkuasaan penghakiman di mana responden,

setelah memilih haluannya untuk menguatkuasakan penghakiman untuk ganti rugi, telah diestop dari memfail suatu rayuan untuk pelaksanaan spesifik. Penyalahgunaan proses mahkamah tidak merupakan satu isu dalam kes *Meng Leong*. Dalam kes semasa, penyalahgunaan proses mahkamah merupakan satu isu yang boleh dipertikaikan, dan tidak ada apa-apa kaitan langsung dengan sesuatu penguatkuasaan penghakiman setakat pemilihan suatu haluan saling ekslusif berkenaan. Oleh yang demikian, kes Meng Leong jelas boleh dibezakan dan tidak boleh dipakai dalam kes semasa. *Meng Leong Development Pte Ltd v. Jip Hong Trading Co Pte Ltd* (dibezakan).

(2) Pemfailan kehadiran, pernyataan pembelaan dan pernyataan pembelaan yang dipinda oleh defendan tidak merupakan pengambilan satu langkah baru dalam prosiding yang akan menghalangnya dari mencabar keesahan guaman kedua. Apa yang dibuat oleh defendan dalam kes ini ialah untuk mengambil langkah-langkah berjaga untuk menghalang penghakiman ingkar dicatat terhadapnya. Plaintif, selepas empat tahun, masih tidak menunjukkan apa-apa niat yang serius untuk menetapkan kes untuk perbicaraan. Pola berlengah-lengah ini tidak berbeza dari guaman pertama di mana plaintif, setelah memperolehi arahan-arahan bagi pelaksanaan guaman, telah gagal mematuhi mereka, dan membawa kepada pembatalan guaman pertama. Atas fakta-fakta latar belakang kes ini, defendan telah memohon dengan betul ke mahkamah untuk menggunakan kuasa sedia adanya untuk membatalkan guaman kedua plaintif sebagai suatu penyalahgunaan proses mahkamah. Defendan tidak boleh dikatakan telah mengenepikan haknya bagi memohon untuk membatalkan guaman kedua atas alasan bahawa beliau telah terlibat dalamnya. Di bawah keadaan-keadaan sebegitu, mahkamah tidak boleh dihalang daripada menggunakan bidangkuasa sedia ada untuk membatalkan kes-kes yang telah didapati telah menyalahgunakan proses mahkamah. *Gabriel Peter & Partners (suing as a firm) v. Wee Chong Jin & Ors* (diikuti).

(3) Oleh kerana sebab-sebab yang dinyatakan di atas, soalan yang dikemukakan dalam rayuan akan dijawab dalam bentuk negatif.

Case(s) referred to:

Bank Bumiputra (Malaysia) Berhad & Anor v. Lorrain Esme Osman & Ors [1987] 1 CLJ 572; [1987] CLJ (Rep) 472 HC ***(refd)***

Cheng Chuan Development Sdn Bhd v. Ng Ah Hock [1982] 2 MLJ 222 ***(dist)***

Gabriel Peter & Partners v. Wee Chong Jin & Ors [1998] 1 SLR 374 ***(foll)***

Meng Leong Development Pte Ltd v. Jip Hong Trading Co Pte Ltd [1985] 1 MLJ 7 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19(1)(d), O. 34

For the appellant - Lum Chee Seng; M/s Lum Chee Seng & Assoc

For the respondent - Chang Tau Sian (Wong You Fong with him); M/s Henry Soong & Chang

[Appeal from Court of Appeal, Civil Appeal No: J-02-1019-2007]

[Editor's note: For the Court of Appeal judgment, please see Boo Are Ngor v. Chua Mee Liang [2008] 4 CLJ 533.]

Reported by Suresh Nathan

JUDGMENT

Zulkefli Makinudin FCJ:

Introduction

[1] This is an appeal by the appellant against the decision of the Court of Appeal which dismissed the appellant's appeal against the decision of the Muar High Court Civil Suit No. 22-49-2002. Before the High Court the appellant was the defendant and the respondent was the plaintiff. We shall refer to the parties as they were before the High Court.

Background Facts

[2] On 2 April 1996, the plaintiff filed an action against the defendant for breach of trust at the Muar High Court ("the first suit"). On 12 August 1999 the High Court gave directions as to the conduct of the suit. The plaintiff did not comply with these directions. On 9 March 2002 the High Court acting on a notice to show cause issued by it on 15 January 2002 made an Order striking out the first suit. The plaintiff did not appeal against this Order. Instead the plaintiff filed a second suit against the defendant. This second suit was filed on 3 April 2002. The

defendant took part in the second suit by filing an appearance, statement of defence and amended statement of defence. Pursuant to O. 34 of the Rules of High Court 1980 ("RHC 1980"), the plaintiff filed a notice of pre-trial case management on 8 November 2002, but until 19 April 2006 the notice was still not heard by the Muar High Court due to repeated adjournments made at the request of the plaintiff. There were also repeated changes of the plaintiff's solicitors and with each change of solicitors the plaintiff made an application to amend her writ of summons and statement of claim. On 19 April 2006 the defendant took out a summons to strike out the second suit on the ground that it amounted to an abuse of the court's process. The High Court dismissed that application. The defendant appealed to the Court of Appeal against the decision of the High Court but her appeal was again dismissed.

The Appeal

[3] On 30 July 2008 this court granted leave to the defendant to appeal against the decision of the Court of Appeal on the following question:

> Where a defendant to a suit which is an abuse of process has taken part in the suit, is he estopped, by virtue of such participation from subsequently having it struck out?

Decision

[4] It is noted the Court of Appeal in its judgment had recognized the principle of law that where a plaintiff's action is struck out for disobedience of a peremptory order, a second action, as a general rule would constitute an abuse of the process of the court. The Court of Appeal went on to state had this been the principle applicable to the facts here, it would have had no hesitation in allowing the defendant's appeal. The Court of Appeal however made a finding that the facts before them are very different. The Court of Appeal dismissed the defendant's appeal on the ground of estoppel by election in that by virtue of her participation in the second suit, the defendant is thereby estopped from applying to strike out the second suit on ground of abuse of the court's process, citing the Privy Council's case of *Meng Leong Development Pte. Ltd. v. Jip Hong Trading Co. Pte. Ltd.* [1985] 1 MLJ 7 as the authority for such a proposition.

[5] We would like to state here that estoppel is an equitable doctrine. Whatever description, whether estoppel by election, estoppel *in pais*, or promissory estoppels or quasi estoppels, it could only be invoked by a party who comes to court with clean hands. The plaintiff when relying on the equity of estopel by election, must show that she has an equity to enforce against the defendant. (See the case of *Cheng Chuan Development Sdn. Bhd. v. Ng Ah Hock* [1982] 2 MLJ 222). In the present case there is no basis upon which an equity could arise in favour of the plaintiff having noted that the plaintiff in fact elected to end her litigation by not appealing against the High Court Order dated 9 March 2002 striking out the plaintiff's first suit. The plaintiff is estopped from filing the second suit. With respect, on this issue we are of the view that the Court of Appeal had misapplied the ratio of estoppel by election under the principle enunciated in *Meng Leong*'s case. The respondent in *Meng Leong*'s case was faced with an alternative course of direction in the enforcement of judgment where the respondent having elected its course of direction to enforce judgment for damages, he was estopped from filing an appeal for specific performance. The abuse of the process of the court was not in issue in *Meng Leong*'s case. Unlike *Meng Leong*'s case, in the present case before this court, abuse of the process of the court is very much a contentious issue, and has nothing to do whatsoever with an enforcement of judgment as far as election of a mutually exclusive course of direction is concerned. Hence *Meng Leong*'s case is readily distinguishable and could not be applied in the present case before this court.

[6] On the issue of whether the defendant having participated in the second suit has the right to apply to strike out the second suit, we are of the view that the course of action taken by the plaintiff and the degree of participation by the defendant in the second suit deserves a closer look. The defendant filed her appearance and statement of defence on 17 and 29 April 2002 respectively. She then filed the amended statement of defence on 11 July 2005 after amendment was made by the plaintiff to her statement of claim. Although the plaintiff had filed a notice of pre-trial case management on 8 November 2002, the hearing of the notice has been adjourned for at least 8 times and has not been heard yet even when the defendant took out a summons to strike out the second suit on 19 April 2006. We are of the view the filing of appearance, statement of defence and amended statement

of defence by the defendant do not constitute taking a fresh step in the proceedings that debars the defendant from challenging the validity of the second suit. What the defendant has done in this case is to take precautionary measure to prevent judgment in default being entered against her if she does not file appearance and statement of defence.

[7] We also noted the fact that four years had lapsed after the plaintiff had filed a notice of pre-trial case management, and the plaintiff still did not show any serious intention to set the case down for trial. This pattern of delay in setting the case down for trial as exhibited by the plaintiff in the second suit is no different from the first suit where the plaintiff after having obtained the directions on the conduct of the suit had failed to comply with the directions given by the High Court, leading to the issuance of the notice to show cause by the High Court and the striking out of the suit for disobedience to the peremptory Order. Based on the background facts of this case it is our judgment that the defendant had rightly applied to the court to invoke its inherent powers to strike out the plaintiff's second suit as an abuse of the process of the court. Order 18 r. 19(1) of the RHC 1980 provides:

> The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) it is otherwise an abuse of the process of the court; ...

[8] It is our view that O. 18 r. 19(1) of RHC 1980 does not specify a time limit during which a party may apply to the court to strike out a pleading. But the application should be made promptly and as a rule before the close of the pleadings. The court, however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial. (See the case of *Bank Bumiputra (Malaysia) Berhad & Anor. v. Lorrain Esme Osman & Ors*. [1987] 1 CLJ 572; [1987] CLJ (Rep) 472). Since the second

A suit has not been set down for trial, the defendant in the present case in our view can still apply to strike out the second suit on the ground of abuse of the process of the court.

[9] We would also like to state here that it is the court which B is empowered to deal with the abuse of its process in the interest of justice and on grounds of public policy. The defendant in the present case cannot be said to have waived her right to apply to strike out the second suit on the ground that she had participated in it. Under such circumstances the court is not prevented from C exercising its inherent jurisdiction to strike out cases found to have abused the process of the court. On this point we would like to refer to the case of *Gabriel Peter & Partners (suing as a firm) v. Wee Chong Jin & Ors.* [1998] 1 SLR 374 wherein his Lordship Yong Pun How, CJ, in delivering the judgment of the Court of D Appeal of Singapore had this to say at p. 384:

> The term, 'abuse of the process of the Court', in Order 18 rule 19(1)(d), has been given a wide interpretation by the courts. It includes considerations of the public policy and the interest of justice. This term signifies that the process of the court must be E used *bona fide* and properly and must not be abused. The court will prevent the improper use of its machinery. It will prevent the judicial process from being used as a means of vexation and oppression in the process of litigation … if an action was not brought *bona fide* for the purpose of obtaining relief but for some F other ulterior or collateral purpose, it might be struck out as an abuse of the process of the court.

Conclusion

[10] For the reasons above stated we would answer the question G posed in this appeal in the negative. We would therefore allow the appeal with costs. We would herein make an order allowing the defendant's application to strike out the plaintiff's second suit on the ground of an abuse of the process of the court.

H

I